There is nothing in her affidavit to show that she has any authority to appear on behalf of or right to represent the so called applicant. In fact, it would appear that the application is made without the knowledge, of, or any instructions whatsoever from, the so called applicant, neither does she allege any relationship nor interest in him, apart from being a close friend.

If it is claimed that Carlton Arthur Hire is indeed the applicant, where is the authority required by Order 2 rule 1 of the Supreme Court Rules?

If it is claimed that Ivy Taye is acting as his agent in the matter, how has such agency been created?

There is no information or evidence on the point before the Court. *Prima facie,* on the affidavit, the application is made by Ivy Taye and on the evidence and information contained therein and in the exhibits, she is a mere stranger or volunteer who has no authority to appear on behalf of Carlton Arthur Hire or to represent him.

The application, therefore, fails on this ground alone, but I would observe that such failure does not prejudice a further and better application.

However, I would make the following observations but without attempting to decide on any further points raised.

In the first place, if an order was issued, as prayed, how are the respondents to obey the same, when, according to the information alleged in the exhibits, Carlton Arthur Hire is neither within the jurisdiction nor in the custody of either respondent? Nor has he been in such custody, except merely temporarily in that of Assistant Superintendent Minns for a very brief period before being handed over to the Dutch authorities. Presumably he has committed no offence within our jurisdiction so as to be extraditable from the Netherlands East Indies. Presumably also he has committed offences against the laws of the Netherlands East Indies for which, with the co-operation of the Singapore Police, he was caught red handed and is now detained in custody in the Netherlands East Indies.

Whatever order the Court might make, whether *nisi* or absolute, such would, therefore, appear to be quite ineffective.

The application also of paragraph (a) of section 386 of the Criminal Procedure Code is also distinctly arguable, but, as I have said, there is no necessity for me to go into these points at this stage, as I hold that the application now before me is by Ivy Taye, a mere volunteer or stranger, and that she is not entitled to the issue of *habeas corpus* on the facts before the Court.

This application, is therefore refused.

Since writing the above I have discovered and considered the fairly recent case of *In re Ning Yi-Ching & Ors.*[1] in which the Solicitor-General stated that there was no case on record in which a *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory or even on behalf of a British subject on foreign territory. In his judgment Mr. Justice Cassels confirmed that a *habeas corpus* would not issue in respect of such foreign subject but as the applicants were in fact foreign subjects, it was not necessary to confirm such fact as regards a British subject.

It was, however, also held that the writ could not issue to Lord Halifax, the then Foreign Secretary, because he was not in control of the prisoners but was only acting in an advisory capacity.

Application refused.

Solicitors : *Elias Bros.*

In re SEAH LIANG SEAH, DECD.

[O. C. J. (Taylor J.) November 29, 1948]

[Singapore — Originating Summons No. 55 of 1946]

Will — Codicil — Forfeiture clause — Construction — Estoppel by record — Whether matter at issue has been dealt with in previous proceedings — Res judicata — Obiter dicta.

In this case the testator by his Will made in 1920 appointed his three elder sons to be the trustees and provided for the younger sons to succeed them as vacancies occurred. A forfeiture clause directed that in the event of the insolvency of any beneficiary during "my lifetime or after my death his interest should lapse, subject to a discretionary power of the trustees to maintain him and his dependants from the forfeited interest. The fourth son, Seah Eng Choe, was adjudged bankrupt in 1922 and discharged in 1923 without any judgment or other outstanding liabilities. In 1925 the testator made a Codicil confirming the Will subject to certain alterations which are not material for this case. Three days later he died. In 1940 one of the trustees died and Seah Eng Choe claimed to fill the vacancy; his claim was resisted by another trustee. Seah Eng Choe applied to the Court by Originating Summons No. 137 of 1940 *inter alia* for a declaration that by virtue of the Will he was a trustee. The Summons was heard by Terrell J.A. who decided that Seah Eng Choe was not a trustee by virtue of the Will but that he was eligible to be appointed to fill a vacancy. He also recorded his opinion, as the question of forfeiture had been fully argued, that "no forfeiture of Eng Choe's beneficial interest had been occasioned by his previous bankruptcy and that if he were appointed a trustee there would be nothing to prevent him from enjoying his share of commission". This opinion was incorporated in the formal order. Seah Eng Choe was subsequently appointed a trustee and thereafter his share of the commission was paid. In Originating Summons No. 55 of 1946 an enquiry was ordered as to who were the beneficiaries entitled to share in the trust property and the following issue was ordered to be tried: "Whether the share of Eng Choe in the residuary and other property has been forfeited by reason of his bankruptcy." One of the

questions raised in the argument was whether the question of forfeiture had been effectively decided in the previous proceedings and was therefore *res judicata.*

Held: (1) on the fact the question at issue was not *res judicata*; (2) the trustees and Seah Eng Choe were estopped by the record from contending that his commission was forfeited, but that the other beneficiaries were not estopped; (3) the question of Seah Eng Choe's other interests was technically open to all parties; (4) in the circumstances of the case the other interests of Seah Eng Choe under the Will were not forfeited.

Cases referred to:—

(1) *Trappes v. Meredith* (1871), L.R. 7 Ch. App. 248.
(2) *Metcalf v. Metcalfe* (1891) 3 Ch. 1.
(3) *White v. Chitty* (1866), L.R. 1 Eq. 372; 14 W.R. 366.
(4) *Re Parnham's Trusts* (1872), L.R. 13 Eq. 413.
(5) *Yarnold v. Moorhouse* 39 E.R. 141.
(6) *Ancona v. Waddell* 10 Ch. D. 157.
(7) *In re Forder* (1927) 2 Ch. 291.
(8) *Re Freme's Contract* (1895) 2 Ch. 778.
(9) *In re Staples* (1916) 1 Ch. 322.
(10) *Badar Bee v. Habib Merican Noordin* (1909) A.C. 615.
(11) *Hoystead v. Commissioner of Taxation* (1926) A.C. 155.
(12) *Re Richerson* (1893) 3 Ch. 146.
(13) *Robins v. Rose* 43 L.J. Ch. 344; 30 L.T. 152.
(14) *Samuel v. Samuel* 12 Ch. D. 152.
(15) *Re James* 62 L.T. 454.
(16) *Re Evans* (1920) 2 Ch. 304.
(17) *Re Walker* (1939) 3 All E.R. 902.
(18) *Montefiore v. Guedalla* (1901) 1 Ch. 435.
(19) *Smith v. Cowdery* 57 E.R. 382.
(20) *In re Champion* (1893) 1 Ch. 101.
(21) *In re Hardyman* (1925) Ch. 287.
(22) *In re Reeves* (1928) Ch. 351.
(23) *May v. Newton* 34 Ch. D. 347.
(24) *In re Lart* (1896) 2 Ch. 788.
(25) *Seymour v. Lucas* 62 E.R. 345.

ORIGINATING SUMMONS.

C. H. Withers-Payne for Seah Eng Kway and Seah Eng Thye.

H. D. Mundell for Seah Eng Choe.

W. Munro for the remaining beneficiaries.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor J. : — This Originating Summons arises out of the trusts of the Will of Seah Liang Seah. The matter is a little complicated because one of the questions in controversy has already been considered by this Court. It is therefore necessary to outline the history of the previous litigation.

By his Will made in 1920 the testator appointed his three elder sons to be the trustees and provided for the younger sons to succeed them as vacancies occurred.

A forfeiture clause directed that in the event of the insolvency of any beneficiary his interest should lapse, subject to a discretionary power of the trustees to maintain him and his dependants from the forfeited interest.

The fourth son, Seah Eng Choe, was adjudged bankrupt in 1922 and discharged in 1923 without any judgment or other outstanding liabilities.

In 1925 the testator made a codicil confirming the will subject to certain alterations which are not now material. Three days later he died.

In 1940 one of the trustees died and Eng Choe claimed to fill the vacancy; his claim was resisted by another trustee. Eng Choe then applied to the Court, by Originating Summons No. 137 of 1940, for:—

(1) a declaration that by virtue of the will he was a trustee;
(2) and (3) Consequential orders;
(4) a declaration that he was entitled under the Will to share in the trustees' remuneration.
(5) directions for service.

On the fifth prayer an interlocutory order was made for notice to be served on Seah Peng Khiang who also claimed to be appointed a trustee but no order was made for service on any other beneficiaries.

The Summons was heard by Terrell J. A. who decided that Eng Choe was not a trustee by virtue of the will but that he was eligible to be appointed to fill a vacancy. He also found "that no forfeiture of Eng Choe's beneficiary interest had been occasioned by his previous bankruptcy and that if he were appointed a trustee there would be nothing to prevent him from enjoying his share of commission."

Seah Peng Khiang did not take part in the argument and was allowed to withdraw "without prejudice to any further claim."

Eng Choe was subsequently appointed a trustee and thereafter his share of the commission was in fact paid but it is contended that it was paid on the footing of discretionary maintenance, that the trustees believed that the beneficial interest was forfeited and treated the decision of Terrell J. A. to the contrary as an *obiter dictum.*

In Originating Summons No. 55 of 1946 an enquiry was ordered as to who are now the beneficiaries entitled to share in the trust property. The Registrar found, following the judgment of Terrell J. A. that Eng Choe is entitled to share. The trustees dispute this. Accordingly it was ordered that an issue be tried between Eng Choe and the other trustees, the issue being :—

"Whether the share of Eng Choe in the residuary, and other property (which is substantial) has been forfeited by reason of his bankruptcy".

and Mr. W. Munro (an Advocate and Solicitor) was appointed to represent all the other beneficiaries.

This is the issue which now requires decision. In substance it is an appeal against the finding of the Registrar and accordingly the trustees are the plaintiffs on the issue and Eng Choe the defendant.

The issue really raises not one question but two distinct series of questions. First as between the trustees and Eng Choe :—

(a) Was the question of forfeiture decided by Terrell J.A. so that it is now *res judicata*?
(b) If not, are the trustees estopped by the record from raising it again?
(c) If the point is open to the parties, is the Court bound by the decision of Terrel, J.A. regarded as a precedent?
(d) If the question of construction is open to the Court, are Eng Choe's interests forfeited?

Secondly, the same questions arise as between Eng Choe and the other beneficiaries but since the others were not separately represented before Terrell J. A. the question whether they are bound or estopped depend, in part, on different considerations and consequently the remaining questions may be open to the beneficiaries, even if not to the trustees.

One object of the issue is to obtain an order which shall be binding on all persons interested in the estate.

The issue as framed does not, on its face, raise the questions of *res judicata* and estoppel. Eng Choe therefore filed an affidavit setting out certain facts suggestive of these questions. In substance this affidavit is a pleading. Counsel for the trustees took the preliminary objection that on a plea of estoppel by record it is not permissible to consider evidence arising outside or subsequently to the record; he admitted, however, he had had notice, apart from the affidavit, that these points would be raised and that he was ready to deal with them. Mr. Munro, for the beneficiaries, assented. The objection was therefore formally allowed and the affidavit rejected. In my view, however, the proceedings are thereby rendered formally defective. I think that the better way would have been to raise these points explicitly in the issue itself and that it should now be amended. If not agreed, this point can be argued in Chambers, on settling the minutes of the formal order to be made in pursuance of this judgment.

The arguments for the trustees were these :—

First, as to estoppel : the first prayer on Originating Summons No. 137 of 1940 failed; the rest of that summons was not in issue. On its face the order is not a judgment on the fourth prayer. In effect, the trustees were successful defendants; how then could they appeal? If they could not appeal then they cannot be bound. On the summons the only question at issue was the remuneration. The question now is the much larger question of a share in corpus. Therefore the issues are not the same.

The summons was between trustees. The plaintiffs are not bound in their capacity as beneficiaries — no beneficiary as such is touched by the Order.

On construction of the forfeiture clause : — in none of the cases cited did the will contain the words "If during my lifetime a beneficiary shall become bankrupt etc."

These words are plain and decisive and no recourse to any rule of construction is necessary. Counsel referred to *Trappes v. Meredith*[1]; *Metcalf v. Metcalfe*[2]; *White v. Chitty*[3]; *Re Parnham's Trusts*[4]; *Yarnold v. Moorhouse*[5]; *Ancona v. Waddell*[6]; *In re Forder*[7] and to *Jarman* on Wills, pages 1487 to 1489; 13 *Hailsham*, page 421, *Daniel*, pages 170, 187; and *Hawkins*, page 1.

Counsel for Eng Choe referred to the correspondence between the parties, which was before Terrell J. A. to shew that the trustees had all along contended that if the commission was forfeited the share in the corpus must be forfeited too so that the whole matter was in issue in Originating Summons No. 137 of 1940. Binding declarations can be made though consequential relief may not immediately follow, Rules of the Supreme Court Orders 52 rules 1, 3 and 5, 26 rule 5, and 55 rule 6. 19 *Hailsham* at pages 212, 215 and 13 *Hailsham* pages 408 — 410; *Re Freme's Contract*[8]; *In re Staples*[9]; *Badar Bee v. Habib Merican Noordin*[10]. The real question before the Court was the effect of the forfeiture clause; *Hoystead v. Commissioner of Taxation*[11]. The parties now are substantially the same. The other beneficiaries are estopped because they were represented by the trustees, *Re Richerson*[12]. They could easily have appealed. *White v. Chitty*[3] (which includes a point not in the other reports of this case).

As to the rule of benevolent constructions : — *Robins v. Rose*[13]; *Samuel v. Samuel*[14]; *Re James*[15]; *Re Evans*[16]; *Re Walker*[17]; *Montefiore v. Guedalla*[18]; *Smith v. Cowdery*[19]; 34 *Hailsham* page 116.

As to the effect of the Codicil: — Evidence Ordinance section 101; 34 *Hailsham* pages 96, 98; *In re Champion*[20]; *In re Hardyman*[21]: *In re Reeves*[22].

Counsel for the other beneficiaries argued that they are not bound by the decision of Terrell J. A. because they were not parties nor were they served with the Order. The trustees represent the estate as a whole so as to bind it as against strangers but not as between beneficiaries. *Daniel* pages 149, 170; *Broome* page 380; *May v. Newton*[23]; *In re Lart*[24]. It was agreed by Counsel for all parties that recourse may be had to the written judgment, to interpret the formal order.

For the purpose of dealing with the questions of *res judicata* and estoppel it is most important to know exactly which parties were effectively before the Court in Originating Summons No. 137 of 1940, exactly which questions were issue and what was acutally decided.

The express object of the applicant was to obtain a declaration that he was a trustee He also asked whether his right to remuneration was forfeited.

The respondents denied that he was a trustee. They also contended that his right to remuneration was forfeited.

The remuneration was fixed by the Will at five per cent of specified assets, to be shared equally by the actual trustees. If there were two they had half each; if there were three they had one-third each, of the same total. Consequently no other beneficiary was financially interested in either of these two points.

The summons was, in substance, a dispute between the trustees, as such; no other beneficiary was specifically represented.

The whole of the summons was before the Court at one time and both questions were fully argued. They depended on different clauses of the will and on wholly distinct arguments. It was never suggested that the right to be a trustee was effected by the forfeiture clause; on the contrary it was agreed beforehand, in a letter of 8th August, 1940 from Messrs. Drew & Napier to Messrs. Allen & Gledhill, that the position of a trustee was not affected by forfeiture of his beneficial interests.

The summons therefore resolved itself into two separate questions of construction of the will.

Eng Choe said: — first, I am a trustee, so appointed by the will; secondly, I have not forfeited my remuneration and am entitled to it.

The trustees said: — first, he is not a trustee; secondly, he is not entitled to remuneration because he has forfeited all his beneficial interests.

On the first question the learned Judge came to the conclusion that neither party had stated his case correctly. He negatived the primary contentions of both sides. His decision was by no means a compromise but it went somewhere between the two contentions. He said, in effect, Eng Choe is not a trustee but he is eligible to be appointed a trustee; as to the second question — since he is not now a trustee he is not now entitled to commission but since the question of forfeiture has been fully argued, I record my opinion (in the hope this may save the parties further costs) that he has not forfeited any of the rights under the will by reason of his bankruptcy.

It is important to notice here two points arising out of this judgment. First, there was never any suggestion that the right to remuneration was affected in any other way than by general forfeiture clause. Either Eng Choe had forfeited all his beneficial interests, including the commission, or else he had forfeited nothing. Secondly, since neither party had, in the opinion of the Judge, framed his case correctly, the judgment could not, in point of form, follow the summons. Nothing in the manner of an "order in terms" was practicable.

The date of distribution was a long way ahead. The only point of immediate practical importance were the questions of trusteeship and remuneration and neither of these could, on the findings of the Court be disposed of by the Order. Some further instrument of appointment was necessary before Eng Choe would become a trustee. This might never occur. The judgment only made it possible. The order could not effect it. The Court does not usually make contingent orders.

The order actually drawn up is peculiar and as the question of estoppel turns largely on its terms it is set out in full: —

Upon the application of Seah Eng Choe the above-named plaintiff, made on the 20th February, 1941, by way of Originating Summons No. 137 of 1940 and upon hearing the solicitors for the plaintiff, for the first and second defendants respectively, and for Seah Peng Khiang, the person served with the proceedings herein under the Order of Court herein dated the 24th October, 1940, and upon the solicitor for the said Seah Peng Khiang having applied to withdraw without prejudice to any further claim and the Judge having allowed him to withdraw, and upon reading the affidavit of Seah Eng Choe sworn on the 8th October, 1940 and filed herein on the 9th October, 1940, the exhibits therein referred to, the affidavit of the said Seah Eng Choe filed herein on the 12th February, 1941 and the exhibits therein referred to IT WAS ORDERED that the said application should stand for judgment and upon the same coming on this day in the presence of the solicitors for the plaintiff and for the first and second defendants respectively the JUDGE DOTH NOT THINK FIT to make any declaration on prayer 1 of the said Originating Summons so that prayers 2 and 3 of the said Originating Summons do not arise and are not the subject matter of any order. And although not necessary for the purpose of answering

paragraph 4 of the said summons as the matter has been fully argued and in order to save the parties further costs IT IS DECLARED that upon the true construction of the said Will and Codicil of the abovenamed Seah Liang Seah deceased the benefits which will be payable to the applicant if he shall be appointed a trustee of the Will and Codicil of the said Seah Liang Seah deceased are not forfeited AND IT IS LASTLY ORDERED that the costs of all parties herein be taxed as between solicitor and client and such taxed costs be paid out of the residuary estate of the said Seah Liang Seah deceased and that the hearing fee be fixed at $25 per hour AND THE JUDGE doth certify that he requires no further argument.

To dispose of a minor point — Counsel for the trustees disputed the statement that the question of forfeiture was fully argued.

It is clear from the written judgment that the whole question of the effect of the forfeiture clause was argued in its widest form but apart from this, the trustees are clearly estopped by the record from setting up this contention which is expressly negatived in the formal order, to the drawing up of which they were parties.

A more serious argument is that the whole of the passage in the judgment dealing with forfeiture is *obiter*. The learned Judge said that in view of his decision that Eng Choe was not then a trustee, the question of forfeiture "did not strictly arise." From the context, however, it is clear that what he meant was that that question did not strictly require decision at that stage. He could not have meant that it did not properly arise because it did properly and substantially arise out of the summons, otherwise he would not have heard full argument on it.

As it had so arisen and been fully argued he delivered his opinion on it, in the hope that this would avoid any necessity to litigate the question again. It seems a fair inference that the learned Judge himself regarded this part of his judgment as not binding on the parties.

Yet they proceeded to incorporate part of it in the formal order. I do not think the Judge ever saw a draft of the order and I do not think he would have approved it.

The words: — "Although not necessary for the purpose of answering paragraph 4" are not based on any words in the judgment and are not correct.

In order to answer paragraph 4 it is necessary to decide the question of forfeiture.

What I think the parties really intended to say in the order was this:—

. . . . . It is not necessary to answer paragraph 4 of the summons at this stage, but since the matter of forfeiture has been fully argued and since the Judge with a view to saving the parties costs, has delivered judgment on that matter IT IS DECLARED by consent, that upon the true construction of the said will the plaintiff's right to share in the remuneration granted to the trustees of such will has not been forfeited by reason of his bankruptcy.

It is true that the words "by consent" do not appear in the order but since the trustees claim to have been the successful parties their solicitors presumably drew up the order. Even if the passage dealing with the fourth prayer was inserted by some other party, the trustees must have agreed to it as it now stands. In my view, they are not now entitled to go back on that agreement. They, or their predecessors in interest, have solemnly put the decision on the record, and they are bound by it. But in terms it relates only to the trustee's remuneration, not to the beneficial interest. Estoppel by record must be apparent on the face of the record. The effect of this decision on the beneficial interest is a matter of argument and deduction.

I do not think anyone could deduce from the order alone, that the question of forfeiture of the beneficial interests was, in effect, decided.

Nor do I deduce that it was agreed at the time, to treat the wider question as decided.

Counsel for the trustees argued that they were successful defendants on the summons. It is true that they successfully negatived Eng Choe's contention that he was already a trustee but in my view they were, on the whole, unsuccessful. Where there are several issues, a party successful in part, can nevertheless appeal as to the other parts on which he failed. The trustees could have appealed against the decision that Eng Choe was eligible to be appointed.

I agree that they would have had difficulty in appealing on any other point, once the order had been drawn up, but the order shews that at the time they did not wish to do so.

In my opinion the parties to the summons said to each other, in effect. "At any rate we will treat this decision as settling the question of the remuneration. The question of the beneficial interest does not arise now and if necessary can be argued again later."

Subsequently the trustees, or their successors, possibly on different advice, changed their attitude. They say, now, that they have throughout treated this part of the decision as *obiter*, but that is certainly not correct. Including it in the order was not treating it as *obiter*. The trustees are not consistent.

It is indeed possible that there was no real agreement, even at the time, and that this rather doubtful or ambiguous part of the Order was in truth a formula devised to conceal a difference rather than to express an agreement.

However that may be, I am clearly of opinion that as against Eng Choe the other trustees are estopped by the record from contending that the remuneration has been forfeited.

If the parties and their advisers had all genuinely wished to take full advantage of the trial Judge's endeavour to save them from incurring avoidable costs they would have gone a step further and worded the order, thus :—

> . . . . . It is declared that no forfeiture of the plaintiff's beneficial interest has been occasioned by reason of his previous bankruptcy.

That would have followed the judgment accurately, and if the order had been drawn up in that way it would clearly have estopped the parties to the summons from litigating the question again.

Further, if an order in that form had been served on the other parties interested in the estate it would have estopped them too. It does not appear, however that there was at that date any person clearly able to bind the other beneficiaries and perhaps a representation order would have been necessary.

But these things were not done. The argument for Eng Choe is that although they were not done yet the effect of the record as it stands is the same as if it had been done.

I deeply regret that I cannot agree, though I have tried to give full weight to the principle that there must be a quieting of litigation and that parties must not be allowed to exercise legal ingenuity by litigating the same question again.

I think the argument for Eng Choe is right in principle; the whole question of forfeiture was fully litigated, and it was decided, but unfortunately it was not plainly put on the record and therefore the well-meant efforts of the Judge were frustrated. Perhaps the parties could have been estopped but on the record as it stands I cannot hold that they were.

It certainly is anomalous that they should be estopped from denying forfeiture of the other interests, when they are estopped from denying forfeiture of the commission, seeing that the sole ground of forfeiture is the one clause which must affect either all of Eng Choe's interests, or none of them, but this anomaly arises from the record, which in my opinion is itself anomalous.

It was also argued that if the trustees are estopped, the other beneficiaries are likewise estopped because they are bound by the trustees. This is certainly true as regards a claim by a stranger to the estate but I cannot find any clear authority for the proposition that the trustees bind other beneficiaries in circumstances similar to these.

As I have held that the trustees are not, in the peculiar circumstances of this case, estopped except as to Eng Choe's right to remuneration, it does not seem necessary to decide whether the other beneficiaries are bound. They are not affected by the decision as to remuneration.

The next question is whether the Court is bound on the question of forfeiture, by the judgment of Terrell J. A. regarded as an authority. This point was mentioned at the hearing but not argued. If the judgment had been reported it would have been reported as it stands and I certainly should have construed the passage on forfeiture as *obiter*. Even taking it in conjunction with the whole file of the proceedings, I still think it was *obiter*. I attribute binding effect to the voluntary incorporation in the record of a declaration founded on a part of this passage but that is a quite different thing. A consent order binds the parties, and it binds the Court as between those parties, but it does not bind the Court as between other parties.

Nevertheless since the matter was argued, the judgment in that issue, though not absolutely binding on the Court, is entitled to weight as being the considered opinion of an eminent Judge and particularly since it is his opinion, not on similar words in another will but on the actual words which now fall to be construed.

I now pass on to the construction of the forfeiture clause.

Apart from the phrase. "If during my life time or after my death" . . . . . the clause follows closely the clauses which have been construed in the cases cited, of which the decided effect is that they include a bankruptcy commenced during the life of the testator but still operative at the date when the gift in question takes effect.

I do not think the words mentioned make any difference. Probably they were inserted by the draftsman *ex abundanti cautela,* in the hope of avoiding litigation of the question. Their plain and natural effect is to include any bankruptcy, whether commenced before or after the date when the will takes effect.

The only difficulty arises from the circumstances that the bankruptcy in question was not only commenced but also completed in the lifetime of the testator.

In construing a holograph will some allowance may be made for the possibility that the testator used technical words in a non-technical sense. In construing an elaborate will, manifestly drawn by a professional lawyer, it is reasonable to attribute to the testator an intention that clauses in the will based on precedent should be construed according to precedent.

In a long series of cases it has been held that the intention of the forfeiture clause is to prevent the testator's property from going away from his family to relieve the creditors of improvident legatees. No case was cited where the clause has operated to the detriment of a solvent legatee so as to increase the shares of other beneficiaries of the will at his expense.

Perhaps the reported case nearest to the present one on the facts is *Seymour v. Lucas*[25] (which was not cited). In that case the beneficiary concerned had obtained his discharge subject to a judgment. No application to enforce the judgment had actually been made but the liability was outstanding. It was held that the interest was forfeited because the liability to alienation subsisted. This case therefore conforms to the general pattern.

The unreported judgment of Terrell J. A. already discussed, is to the same effect.

Precedent therefore would lead one to construe the clause so as to avoid forfeiture in the circumstances of this case.

If Eng Choe had procured the annulment of his bankruptcy by paying his debts in full during the life time of the testator it could not, I think, in view of the authorities, have been maintained that forfeiture still resulted.

The construction contended for by the trustees therefore involves attributing to the testator an intention to draw a highly technical distinction between annulment and discharge and to discourage or punish by forfeiture a bankruptcy terminated by discharge, although an annulled bankruptcy would not be a cause of forfeiture.

It was suggested in argument that this testator did not belong to the class which regards bankruptcy without aversion but that on the contrary he did belong to a class which resents the stigma to the whole family when any member becomes bankrupt and that he intended to discourage imprudence by excluding any beneficiary who had been bankrupt, whether discharge or not, from participation in his estate.

If he had indeed no intention, and had so instructed his draftsman, it is hardly likely that the latter would have used expressions frequently construed by the Courts as designed to prevent alienation.

It is perfectly true that testators are entitled to be original and to improve unusual and even eccentric conditions on their legatees but the Courts cannot infer an unusual intention where the clause used is in the main conventional.

The clause must be construed as a whole. The reference to bankruptcy is immediately followed by reference to other incidents which resemble bankruptcy in that they involve alienation but not all of which involve a stigma. What the testator meant by bankruptcy can be deduced from what he meant by the accompanying words, *Noscitur a Sociis.*

In general, a will speaks from death. Forfeiture clauses have usually contained words of futurity, such as :—

> If any beneficiary shall become bankrupt . . . . . he shall forfeit his interest.

The Courts have consistently construed these words of futurity as equivalent to : "If any beneficiary shall be a bankrupt (whether the bankruptcy shall have begun before or after my death) he shall forfeit his interest" because they held that the intention of the testator was to prevent alienation and they wished to give effect to that intention.

In other words it is the alienation that is the real cause of the forfeiture. It was argued for the trustees that this artificial construction of words of futurity as including a bankruptcy begun in the past was adopted to resolve an ambiguity but I do not think this is correct. The construction was in every case adopted not to resolve an ambiguity, but to avoid frustration of the real intention of the testator which, it was held, was to avoid alienation.

Also, I think this argument ignores the important fact of the codicil. In this case the testator by a codicil made only three days before his death, confirmed his will in all respects now material. This has the effect of remaking the will on the date of the codicil. The will therefore, for the present purpose, speaks from the date of the codicil. It says "If during my life time or after my death any beneficiary shall become bankrupt, etc."

If therefore we take the matter as from the date of the codicil, Eng Choe was not bankrupt at any time during the remainder of the testator's life or afterwards. On a strictly grammatical construction of the words "shall become bankrupt" and without any reference to real or presumed intention, no cause of forfeiture has arisen.

It is assumed that the testator at the date of the codicil knew of his son's bankruptcy it must equally be assumed that he knew of the discharge. Similarly, if knowledge that similar clauses had been construed as applying to prior but uncompleted bankruptcies is attributed to the testator he must equally be taken to have known that such clauses are deemed to be based on an intention to prevent alienation. If he really intended to forfeit for stigma he had an opportunity to say so in his codicil; he did not do so.

For all these reasons it appears to me that Eng Choe's interests under the will are not forfeited.

To sum up — I am of opinion that the question was not *res judicata* but that the trustees and Eng Choe were estopped by the record from contending that his commission was forfeited; the other beneficiaries were not estopped; that the question of forfeiture of Eng Choe's other interests were technically open to all parties but that no forfeiture had been incurred.

The issue is, in the main, duplication of a question already litigated. It is especially important to discourage, by all available means, the frittering away of any estate, large or small, in costs. The estate has already borne the costs of all parties to Originating Summons No. 137 of 1940 and it is wholly deplorable that there should have been this duplication. But on the materials now before me it is impossible to say how far the present litigation may be due to an excess of legal ingenuity, how far to the lack of it (for instance, in relation to the order already discussed) and how far to changes of view of the trustees or their advisers which, if they have occurred, may be due to changes in personnel of either or both. At present, therefore, I do not see any sufficient reason for ordering payment of costs otherwise than out of the estate but if any party wishes to adduce evidence or argument on this point the Summons can be set down for further consideration.

In any event the formal order must be settled before a Judge in Chambers.

Order Accordingly.

Solicitors: *Drew & Napier; Sisson & Delay; Allen & Gledhill.*

HAJI DAUD & ANOR. v. MOHAMED YASIN.

[A. C. J. (Callow J.) December 7, 1948]

[Malacca — Civil Appeal No. 3 of 1948]

Practice — Jurisdiction — Res judicata — Matter adjudicated before Kathi — Whether Magistrate has jurisdiction — Mohammedans Ordinance (Cap. 57).

In this case the respondent obtained judgment in the Magistrate's Court for the sum of $300 alleged to be the amount of compensation (tebus talak) agreed to be paid by the first defendant. It appeared that the first defendant had agreed to pay the sum of $300 in the nature of compensation for the crime of adultery.

Held, (1) when the learned Magistrate became aware of the judgment or order of the Kathi, he should have held *res judicata* and dismissed the action; (2) the judgment of the learned Magistrate in this case was wrongly given and must be set aside.

CIVIL APPEAL.

C. S. Jayaswal for the appellants.

W. H. Salt for the respondent.

Callow J. : — This is an appeal by the defendants against the judgment of the Magistrate, Malacca, delivered on the 28th of August, 1948, in favour of the plaintiff-respondent for $300 and costs.

It is apparent that the matter was before the Kathi of Belimbing, Alor Gajah, on the 5th of March, 1948, and his decision reads :—

On this day, 5.3.48 I have decided the case between Mohamed Yasin bin Mohd. Som and Haji Daud bin Haji Ali regarding the wrongful act of Haji Daud on his (Mohd. Yasin's) wife.

I have examined this case, and having heard the evidence given by witnesses in this Court and on the admission of Haji Daud (not present but deputised by his brother Haji Yunus), Haji Daud asks that this matter should not be brought up before a higher Court and requested that he be allowed to pay $300 (Tebus Talak). Mohamed Yasin agreed to the offer made by Haji Daud, I, therefore, ordered as aforesaid.

The payment is guaranteed by Haji Yunus verbally and in writing before me.

Sd. Kathi Haji Mahadi bin Naam.
(Seal) 5.3.48.

Mr. Salt for the plaintiff-respondent said he took action in the Magistrate's Court because it was the only way he could proceed to execution. He said he regarded the decision of the Kathi as an arbitration award, and not as a Court judgment. Mr. Salt pointed out that the parties had acted in accordance with custom and had submitted to the Kathi's inquiry. The question of jurisdiction had not been raised prior to this appeal, and it was too late to do so.

But learned Counsel for the plaintiff-respondent himself raised jurisdiction in the Court below. Part of the note of his address reads :—

Ex. B. (that is the Kathi's decision). It has not been set aside — this Court has no power to examine whether or not Kathi has jurisdiction.

The note is taken from page 7 of the record.

Now the Kathi's jurisdiction is set out in the Mohammedan Ordinance (Cap. 57). Mr. Jayaswal